No. 4419

United States
Circuit Court of Appeals
For the Ninth Circuit

B. S. NUNN,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the District of Arizona

THE CHANDLER ARIZONAN, CHANDLER, ARIZONA

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APPELLANT'S BRIEF

B. S. NUNN,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

STATEMENT OF THE CASE

On the 30th day of August, 1924, four Police Officers of the City of Phoenix, in Maricopa County, State of Arizona, and Federal District in said State, armed with a search warrant issued by the Acting Police Judge of said city went to and entered the private dwelling house of B. S. Nunn, plaintiff in error here, with full knowledge that No. 1102 South Central Avenue, in said city of Phoenix so entered by them, was his private dwelling and occupied by him and his wife for that purpose only, their object being to search for intoxicating liquors.

On entering they found Nunn and his wife there but no one else. After reading the search warrant they proceeded to search the premises and found, under the bathroom and kitchen therein, two barrels and three bottles of very good whisky all of which the officers carried away to the Police Station in said city, one of the barrels was full and the other about

half full. Mr. Nunn was taken in custody and later turned over to the Federal authorities for prosecution.

Quite a few days after the raid the confiscated property was turned over to the National Prohibition Agents at Phoenix.

Thereafter, on the 20th of October, 1924, and after having been bound over to the District Court of the United States for the District of Arizona, plaintiff in error was informed against by George T. Wilson, Assistant United States Attorney for the District of Arizona, charging him with "violating Section 3, Title 2, Act of October 28, 1919, of the National Prohibition Act" in this to-wit; "wilfully and unlawfully possessing intoxicating liquor."

(T. R. pp. 1-3)

On the 22nd of October, 1924, and prior to arraingment, plaintiff in error demurred to the information because it did not state (a) that the alleged possession was, at a time and place where possession was, unlawful or illegal, (b) that the liquor was possessed in any particular place and, (c) that the liquor was possessed at a particular place other than a place where possession is lawful.

At the same time he moved to quash and set aside the information because the charges and facts therein set forth did not constitute a violation of law or a public offense, etc.

(T. R. pp. 4-5)

Thereafter, on the 25th of October, 1924, after argument on demurrer and motion to quash, the Honorable, F. C. Jacobs, Judge of the District Court of the

United States aforesaid, overruled the demurrer and denied the motion to quash.

(T. R. p. 7)

On the 5th of November, 1924, plaintiff in error appeared for arraignment before said District Court and plead "not guilty".

(T. R. p. 8)

On the 6th of November, 1924, plaintiff in error, having been tried by a jury and having rested his case without offering any evidence, was found guilty, whereupon on the 8th of November, 1924, judgment was pronounced upon him by the court and a fine of $500 assessed.

Plaintiff in error was thereafter duly admitted to bail in the penal sum of $750, which was furnished and approved by the court.

(T. R. pp. 33-35)

From the rulings of the said District Court on the demurrer to, and motion to quash, the information, on the admission of any evidence at all by the Government and from the judgment and verdict of the jury, B. S. Nunn brings writ of error in this court.

QUESTIONS INVOLVED

(1) Does the information in this case properly and sufficiently charge violation of the National Prohibition Act—"wilful and unlawful possession—" without alleging that the possession alleged was, at a time and place where possession was, unlawful or that the liquor was possessed at a particular place other than at a

place where such possession is lawful?

(2) Can conviction and judgment in a criminal case be had and sustained upon evidence tending to support an information charging merely "wilful and unlawful" possession of intoxicating liquor, in face of a motion to quash the information and, while the premises, where possession of liquor occurred, were possessor's private dwelling, occupied and used by him as such only?

(3) Is possession of intoxicating liquor in one's private dwelling, when occupied and used for that purpose only, unlawful under Sections 10138½ aa and 10138½ t, of U. S. Comp. Stat., 1923?

(4) If Congress exempted possession of intoxicating liquor, under Section 10138½ t, in one's private dwelling while occupied and used by him as his dwelling, must a defendant in a criminal case who is charged with unlawful possession of liquor prove that such liquor was lawfully acquired or possessed by him when in his private dwelling or must the prosecution prove its case e. g., wilful and unlawful possession?

ASSIGNMENT OF ERROR No. 1

The court below erred in over-ruling demurrer to information because it does not state that the possession alleged was, at a time and place where possession was, unlawful or illegal and that the intoxicating liquor was possessed in any particular place and that said intoxicating liquor was possessed at a particular place other than a place where such possession is lawful. (T. R. p. 4)

ASSIGNMENT OF ERROR No. 2

The court below erred in denying motion to quash the information because the charge therein constitutes no violation of law in that it does not state that the intoxicating liquor was possessed at a place other than at one where possession is lawful but that, as a matter of fact, the intoxicating liquor was possessed in the private dwelling of Nunn occupied and used as such only. (T. R. p. 5)

ASSIGNMENT OF ERROR No. 3

The court below erred in admitting any evidence at all on behalf of the prosecution because, the information does not sufficiently charge any public offense or violation of the National Prohibition Act. (T. R. Bill Exc. p. 22)

ASSIGNMENT OF ERROR No. 4.

The court below erred in not directing the jury to return its verdict of "not guilty" because the evidence conclusively shows that the liquor was possessed in the private dwelling of plaintiff in error, while occupied and used by him for that purpose only and, because the information fails to charge and the evidence fails to show that the liquor so possessed by plaintiff in error in his private dwelling was possessed for an unlawful purpose and in an unlawful manner. (T. R. Bill Exc. p. 26)

ASSIGNMENT OF ERROR No. 5

The court below erred in denying the motion in

arrest of judgment because the information fails to charge any public offense or any violation of the National Prohibition Act in that it fails to charge that possession of intoxicating liquor as alleged was such possession as is prohibited by the Act and it fails to state the place of possession; that therefore, no evidence whatsoever should have been received and hence no convicition or judgment could be had and pronounced. (T. R. Bill Exc. p. 28)

ARGUMENT AND AUTHORITIES.

On Assignments of Error 1 and 2.

The first two assignments of error we shall, of necessity, consider together. Section 10138½ aa U. S. Comp. Stat. 1923, provides

"No person shall on or after *** manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, ***"

And Section 10138½ t, same Title, provides

"***But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."

The first section above cited makes it unlawful to possess intoxicating liquor except as authorized. The authorization therefor and exception provided is found

in the last section cited; it does not make it unlawful to possess liquor in one's private dwelling while the same is occupied and used as such only, in spite of the fact that the Act is liberally construed toward the end that use of intoxicating liquor as a beverage may be prevented. This last section concludes

"And the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, or used."

Clear reasoning tells us that possession of intoxicating liquor is first made unlawful by Congress.

But Congress has thrown around this law a safeguard against abuse of or misapplication to it by plainly protecting the hearth and home from violation by wrongful misinterpertation in that it shall not be unlawful to possess liquors in one's private home, when the place of keeping is occupied and used as a home only; and liquor so possessed in one's home need not be reported provided such liquor is kept there for (a) personal consumption of the possessor or owner of the home and his family residing there, or (b) for such owner's bona fide guests.

The undisputed facts disclosed, both at the preliminary hearing and at trial, and here by the bill of exceptions, dove-tail into the exception of the statute.

Attacking the information in this case filed the question "does it sufficiently charge a violation of Section 3, Title 2, Act Oct. 28, 1919, possessing intoxicating liquors wilfully and unlawfully", arises. The information, stripped of all unnecessary verbage, charges "that Nunn, on or about the 30th of August, 1924, and within the Federal District of Arizona, did

wilfully and unlawfully possess intoxicating liquor, to-wit; about seventy five gallons of whiskey, which was then and there fit for use for beverage purposes, the said Nunn having no permit to possess same." (T. R. p. 1-2)

As once stated the undisputed facts are that the liquor was possessed by Nunn in his private home while occupied and used by him and his family as such only. Under these facts the information was attacked be demurrer and motion to quash it. (T. R. p 4, 5)

We insist that the demurrer to and the motion to quash the information should have been sustained by the court below. (T. R. Bill Exc. p. 20-24 incl.)

Many of the United States District Courts have passed on these two assignments of error but no authority to fit the case at bar are we able to find by the Appellate Courts and this case is perhaps the first for consideration.

In Hilt et al v. U. S., 279 Fed. p. 421, an indictment charged two counts, the second one was "unlawfully and knowingly possessing intoxicating liquors." It was demurred to and also moved to be quashed because no facts were stated showing the alleged possession was accompanied by such purpose or intent, (unlawful and knowing) nor were facts stated therein that were, under the circumstances, such as would constitute a violation of law. The Circuit Court of Appeals held the indictment insufficient. Comparing the indictment in that case with the information and facts in the case at bar one finds it a much stronger case, in fact, in the Hilt case the court said that the facts averred are consistent with the alleged possession of intoxicating liquors being a legally permitted one.

In Anderson v. U. S., 294 Fed. p. 593, the Circuit Court of Appeals, on page 596, states

"Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception (indictment), the pleader may safely omit any such references, as the matter contained in the exception is matter of defense and must be shown by the accused."

So, in the Nunn case here the information should contain at least sufficient allegation showing the accused is not within the exception, or in other words, it should sufficiently show that he violated the law.

It is not at all difficult to plead so as to apprise this accused of the exact nature of the charge against him thereby furnishing him with the light to the law and it is unnecessary to plead in the information any negative averments or exceptions.

This court, in Hockett et al v. U. S., 265 Fed. 588, and Davis et al v. U. S., 274 Fed. 928, has held "indictment need not negative exception; " but the issues in those cases are wholly dissimilar to the issues in the case at bar as a careful analysis proves and therefore could have no application here. The language

of the section defining the offense contains an exception the ingredients of which could not be accurately and clearly described without omitting the exception in the information against Nunn; the facts here are that the whiskey was taken from a private dwelling, this the Government knew at and after the preliminary hearing, yet, with this knowlege it prosecuted Nunn for unlawful possession of liquor. (in his private home.)

Suppose, the information showed "unlawful possession at 1102 South Central Avenue, Phoenix, Arizona, the residence of Nunn, et cetera"; could such information maintain under the law in the face of demurrer and motion to quash it? This we conceive to be the real test. We do maintain that it could not stand; then, on this logic and reason; is the prosecution in this case not one contrary to the dignity, intent and spirit under Section 10138½ t? Again, is a rule which works one way only not a poor rule? Is the information in this case not a subterfuge or an attempt to evade the very statute by which Congress clearly intended to protect the private home from invasion and confiscation of property clearly permitted therein?

Attention is called to the fact, (T. R. Bill Exc. p. 20) that the search of and seizure in the home was by City Police Officers, who turned over and conveyed what they found and knew to the Prohibition Agents. Evidently the Police could not, successfully, or would not, prosecute Nunn and, the Prohibition Officers knowing this, accepted the evidence and used it and the Police Officers to make out a case, although let it be remembered, that the Federal Prohibition Agents could not obtain this evidence themselves except by

search warrant; it is also only too true that the Federal Agents could not procure such warrant by virtue of which a private dwelling may be searched except for probable cause in this to-wit; that they would first have to conclusively show and prove to a Federal official having authority to issue search warrants, that a sale or sales of whiskey are being made in that dwelling.

Under the facts in this case appearing as conclusive matters of record here the Federal Prohibition Agents could not obtain a search warrant at all, hence, they could not confiscate the whiskey and could not prosecute Nunn.

In the case of Dukich v. U. S., 296 Fed. 692, this court held the information, attacked on demurrer, good and rightly so; that case also does not bear the slightest semblance to the case at bar because it was a case where "such possession of liquor" was prohibited, and the facts there showed that liquor was "kept" and sold at a place commonly known as a "soft drink resort"—a public place. Certainly, in that case the informer would not, and could not, as a matter of propriety to say the least, be required to plead defensive negative averments in the information.

Likewise, we refer to the case of Millich et al v. U. S., 282. Fed. 604, also decided by this court in 1922. In it demurrers were interposed to the indictment charging in one count "unlawful possession of intoxicating liquor, et cetera." This case is also no guide for, nor does it fit, the case at bar because there was a possession of liquor in a cafe—a public place, similar to the facts in the Dukich case, supra. No issue on the facts, by motion to quash indictment, was raised.

In Bell v. U. S., 285 Fed. 145, (C. C. A. 5th Cir.) the defendant was charged with transportation and unlawful possession of intoxicating liquors, the second count was for unlawful possession by information which charged "unlawfully possessing intoxicating liquors for beverage purposes, said possession not being for any of the reasons permitted in the Acts of Congress for lawful possession thereof and not being for sacramental, scientifical, mechanical or medicinal purposes." The court held this information good because the plain and simple exceptions therein plead put the defendant upon ample notice of violation of the National Prohibition Act with which he was charged in this count. We think that without stating any technicalities or detailed specifications, the informer in the authority last cited plead clearly enough the exceptions to amplify a clear charge of violation of law. Let it be remembered that in that case the facts showed that the accused was not only a violator of the National Prohibition laws, but a continued violator thereof when he committed himself by saying, "well, I guess you have got me this time." We are convinced that the informer in the Nunn case could have plead a violation of law.

Following are a few of the reasonings of the many District Judges on the foregoing subject and special attention is called to "U. S. v. Cleveland, 281 Fed. 249," by reason of the sound and clear logic therein:

"U. S. v. Descy, 284 Fed. 724, reading from bottom of page 726;"

"U. S. v. Illig, 288 Fed. 939, reading from pages 942 (3), 943 (4, 5) and specially from page 945 (7, 8);"

"U. S. v. A. Quantity of Intoxicating Liquors, 289 Fed. 278, reading from pages 279, 280, and from top of page 281;"

"U. S. v. Boasberg, 283, Fed. 305, reading from top of page 307, page 311 (3), page 312 (4) and (5); 260 U. S. 756, 43 S. Crt. Rep. 246;" (this case was submitted on demurrers to and motions to quash two indictments which were the main contentions as in the case at bar.)

On Assignments of error Nos. 3, 4 & 5

These last three assignments of error will be considered together because of their close relation to each other under the facts and issues.

As has been submitted by argument and law cited in support of the insufficiency of the information in this case it follows as a matter of logic and common sense that no evidence whatsoever could become admissible, and if the charge of crime is insufficient there is no charge at all and the controversy ends there without further proceedings. There being no basis for any accusation of crime or violation of law by Nunn, none existed as the charge was timely and legally attacked by demurrer to and motion to quash the information. But one of two things could have been done, that is, the District Judge should have dismissed the information in this case by either sustaining the demurrer or by quashing the information.

This case should never have been allowed to go to the jury for consideration because the liquor was found unconcealed and properly in no place where it is unlawful to have it. No permit is required to keep liquor in one's home under conditions hereinbefore stated. If Congress had intended that liquor kept in

one's home should be reported or a permit sought for its keeping therein, then proper mandatory legislation to this effect would now appear on our statute books. Congress did exactly what it intended to do, that is, to permit one to have liquor in one's home for personal consumption and for entertainment of legitimate guests thereat. In no sense could Congress mean that a citizen of this great and freedom-loving republic should be compelled to prove his innocence when charged, in general and uncertain language, with unlawful possession of intoxicating liquor, under Section 10138½ aa, supra, when the evidence fails to support such charge but instead dèparts therefrom and properly supports a charge under Section 10138½ t of the National Prohibition Act, 1923, supra, on which no success could be hoped for at all.

Sacred and dear to all of us there still stands that great bulwark, ever above and supreme to congressional legislation upon the Volsted Act,—the constitution of the United States.—"

"No person shall be * * * compelled in any Criminal Case to be a witness against himself" * * *

Again analysing the evidence somewhat we can but conclude that the presumption of innocence strongly favors Nunn in that, the Government's evidence is silent as to any sale by him at his home or occupying and using his home for the purpose of maintaining a common nuisance therein; nor was his good whisky hidden by him, to the contrary, he kept it in the plain and proper place—in the little cellar under his bathroom and kitchen—; the natural presumption follows, nothing to the contrary being evident, that he kept it there for his convenience, personal consumption and

perhaps for the entertainment of any legitimate guests; certainly, he could not be presumed to engage in what is commonly known as "bootlegging" just because he had a barrel or two and three glass containers full of good whisky.

(Witness O'Hagan, Bill Exc. p. 25)
(Witness Kent, Bill Exc. p. 26)

It is said in "Singleton vs. U. S., 290 Fed. 130," (5th Circuit) by Judge Rose, (reading from page 131, 2,) that this court, in Panzich vs. U. S., 285 Fed. 871, said "that when liquors found, even in a private home, and the possessor has no permit for it, the burden of proof is on him to show it was kept for a lawful purpose." * * * In so far as the case at bar may be effected by the Singleton case we find it dicta and hence has no application to the Nunn case because a different set of facts exist there.

But, carefully analysing the authority referred to, we find the facts to be as follows; Panzich was charged with maintaining a common nuisance, by keeping, selling and bartering intoxicating liquors in violation of the National Prohibition Act; a number of automobiles continuously came to and stopped at Panzich's home and liquor was found in them; men were seen coming from the dwelling with liquor; a considerable quantity of liquor was found in that home on search. These facts, unlike the facts in the Nunn case, disclosed only to clearly that a private dwelling had lost its true identity and had assumed that of a common nuisance. There the accused were unclean and cunning in that, they wilfully imposed upon the very privileges granted them under Section 10138½ t, by converting their private home into what is commonly termed a bootleggers' joint.

This court properly quoted (reading from page 873) that * * * "any room, house, or place where intoxicating liquor is sold, kept, or bartered, in violation of the Act, is declared to be a common nuisance" * * * and * * * the possession of liquor (in a home) by a person not lawfully permitted to possess it (in the home) shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, or otherwise disposed of, in violation of the Act. This court goes on and holds that* * * "it becomes incumbent upon a defendant to prove that the liquor was lawfully possessed in the premises." This latter phrase is important in that, the facts in the Nunn case show conclusively that he possessed his good whisky without any unlwful or conniving intent on his part, in his private dwelling; a place where it is lawful to have it.

After the District Judge heard the evidence adduced on the very fatal information in the case at bar, there was but one thing to do by way of correcting his error in over-ruling demurrer and motion to quash and that was to take the issues from the jury by directing it to find Nunn "not guilty" as charged.

We ernestly press upon the court that the evidence offered by the Government and admitted by the lower court, in so far as it was intended to support the naked information in this case, failed in its purpose in that, it conclusively established the innocence of plaintiff in error. (Bill Exc. p. 20 T. R.)

The intent expressed in the information by the word "wilfully" and wholly unsupported by any evidence in this case, must therefore, also fall by the wayside and no legal conviction and judgment could be

had and pronounced, nor could a valid sentence or punishment be imposed under the law, all the facts, circumstances, and issues of law involved.

Plaintiff in error sincererly prays for complete vindication of this court's reversal of the rulings, orders and judgment of the District Court.

Respectfully Submitted.

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